

# FEMINIST LITIGATION: AN OXYMORON?—A STUDY OF THE BRIEFS FILED IN *WILLIAM L. WEBSTER V.* *REPRODUCTIVE HEALTH SERVICES*

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## I. INTRODUCTION

I am sure that I am not alone in wondering whether one can be a feminist and, consistent with that perspective, use the courts for litigation. Consequently, I am surprised to find this question often ignored in the many articles in the area of feminist jurisprudence. Often we are told the correct feminist position on a particular issue, but rarely are we told whether the way to achieve that position is through legal argumentation and, if legal argumentation is appropriate, how to make legal arguments from a feminist perspective.<sup>1</sup> In this Article, I want to begin to address these issues. Specifically, I would like to share my thoughts on the subject of feminism and constitutional litigation in the context of the abortion debate.

I will pose two questions: first, have feminists been true to their perspective in using the courts to resolve the abortion issue, and, second, when they have turned to the courts, have they spoken in a feminist voice? Many feminists in the United States

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<sup>1</sup> To the extent that scholars do discuss the appropriateness of litigation, they do so in order to compare litigation with alternative dispute resolution. See, e.g., Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee, & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) [hereinafter Delgado]; Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). In this Article, I am comparing litigation to legislative politics rather than to another form of adjudicatory dispute resolution.

might find this question to be a nonquestion.<sup>2</sup> However, if asked, their responses probably would include the following: (1) that feminists had no real choice but to turn to the courts for resolution of the abortion issue, (2) that they have spoken to the courts in an authentically feminist voice by making "pro-choice" legal arguments, (3) that the activist judgment they obtained in *Jane Roe v. Henry Wade*<sup>3</sup> was a real victory because it entrenched the pro-choice position in our constitutional discourse for seventeen years, and (4) that no matter what retrenchment occurs regarding the *Roe* decision, those seventeen years constituted an enormous victory for women, which can be measured by the number of women's lives that were saved by avoiding the need to have illegal abortions.<sup>4</sup>

Some feminists<sup>5</sup> and leftist scholars<sup>6</sup> in Canada do not share American feminists' satisfaction with *Roe* and, more generally,

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<sup>2</sup> For discussion of the concept of a "nonquestion," see MARY DALY, *BEYOND GOD THE FATHER* (1973). A "nonquestion" is a question that we do not even think to ask because the process of socialization makes the question itself unthinkable. Because of our aggressive, adversarial legal culture, many feminists have accepted the tools of the adversarial system without questioning whether they are, in fact, feminist tools. Thus, the question of whether activist litigation strategies are feminist has been a "nonquestion."

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> This speculation is based on responses to my delivery of versions of this Article at various conferences and faculty workshops as well as classes in feminist jurisprudence at Tulane Law School and the University of Toronto Law School.

<sup>5</sup> See, e.g., Judy Fudge, *The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles*, 25 *OSGOODE HALL L.J.* 485 (1987) [hereinafter Fudge, *The Public/Private Distinction*]; Judy Fudge, *The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada*, 17 *INT'L. J. SOC. OF LAW.* 445 (1989); Kathleen A. Lahey, *Feminist Theories of (In)Equality*, in *EQUALITY AND JUDICIAL NEUTRALITY* 71 (Sheillah L. Martin & Kathleen E. Mahoney eds. 1987).

Of course, the Canadian-feminist movement is not monolithic. Many Canadian feminists support an activist role for the courts and, in fact, filed a brief with the United States Supreme Court in *Webster* arguing that the Court should not overrule *Roe*. See Brief of Canadian Women's Organizations, *Amici Curiae* in Support of Appellees, William Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief of Canadian Women's Organizations].

<sup>6</sup> See, e.g., MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (1989); Allan C. Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship*, 58 *S. CAL. L. REV.* 701 (1985). The pro-democracy perspective is embraced by Canadian constitutional theorists of a wide variety of political perspectives, not simply the critical left or Marxist perspective. See, e.g., PATRICK MONAHAN, *POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA* (1987) (a pro-democracy argument which is not as leftist as others in political orientation); RONALD I. CHEFFINS & PATRICIA A. JOHNSON, *THE REVISED CANADIAN CONSTITUTION: POLITICS AS LAW* (1986) (a British-oriented pro-democracy argument which is critical of law as politics).

American feminists' confidence in the ability of feminists to convince the courts to resolve social and political questions through constitutional litigation. Some Canadian feminists view constitutional litigation with skepticism for several reasons. First, they view the Canadian legislative branch as more progressive than the judicial branch at this time in Canadian history.<sup>7</sup> Second, they suggest that constitutional argumentation necessarily co-opts radical arguments by turning them into liberal arguments.<sup>8</sup> Finally, they question whether we want to turn to authoritarian institutions such as courts to resolve political questions.<sup>9</sup>

The Canadian critique of constitutional litigation is relevant to constitutional litigation in the United States for several reasons. First, the American legislative branch, like the Canadian legislative branch, currently appears to be a more progressive institution for consideration of civil rights than does our judicial system. Recent conservative legal decisions suggest that many legislatures at both the federal and state levels are currently the more hospitable forum for achieving civil rights in the United States.<sup>10</sup> Second, as I argue below, constitutional argumentation may have co-opted some of our feminist arguments or, more specifically, our abortion arguments by making them "liberal" rather than "radical."<sup>11</sup> Finally, although I do not find the authoritarian argument convincing because it seems insufficiently attentive to the safeguards that often exist to a greater degree in a courtroom than in a legislative hearing,<sup>12</sup> I do think that the authoritarian argument raises the more general question of

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<sup>7</sup> This is in part because one of the first decisions rendered by their Supreme Court after the ratification of the Canadian Charter of Rights and Freedoms (Constitution Act, 1982, Schedule B to Canada Act 1982 (U.K., 1982, c.11), Part I, Canadian Charter of Rights and Freedoms) harmed rather than benefited progressive interests. *See* *Alberta Union of Provincial Employees v. Attorney General of Alberta*, 3 W.W.R. 577 (S.C.C. 1987) (right to strike and right to bargain collectively not constitutionally protected under section 2(d) of the Charter, which guarantees freedom of association). For further discussion of this argument, see Fudge, *The Public/Private Distinction*, *supra* note 5.

<sup>8</sup> *See, e.g.*, Fudge, *The Public/Private Distinction*, *supra* note 5; Hutchinson, *supra* note 6; MANDEL, *supra* note 6.

<sup>9</sup> *See, e.g.*, MANDEL, *supra* note 6.

<sup>10</sup> *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (holding that minority set-aside program which had been passed by city council was unconstitutional). *See also* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. §§ 1687-88, 29 U.S.C. §§ 706, 794, 42 U.S.C. §§ 2000a-4a, 6107 (1988)) (overturning Supreme Court's narrow interpretation of Title IX).

<sup>11</sup> *See infra* Part II.

<sup>12</sup> *See generally* Delgado, *supra* note 1.

whether legal argumentation affects the kind of person one is. That is, does argumentation, in whatever forum, move us away from our aspirations for ourselves, as feminists?

As a religious feminist, I value compassion and constructive dialogue—I try to find ways to listen to others in the words they use to describe their own lives. Argumentation tends to stand in the way of that task because, when we argue, we speak to convince others rather than to learn for ourselves. Nevertheless, as a lawyer living in Louisiana, which in my view is the heart of discrimination in the United States, I frequently find myself engaging in argumentation. While I try to preserve my feminist sense of self, I find that I must argue on behalf of clients to help them achieve structural changes in society and receive compensation for the degrading discrimination that they have been forced to endure. Yet, my conscience tugs at me and asks me how I can continue to make arguments in the courtroom while I teach my students the importance of dialogue and compassion in the classroom.

I am finally developing some answers for my feminist conscience. I would like to share them in the hope that we can engage in dialogue to refine these answers further and so that we can begin to reshape how we present constitutional arguments in litigation. I will begin by discussing the importance of dialogue and how the aspiration of dialogue relates to our work as feminist lawyers. My purposes are to illustrate the importance of dialogue to feminism and to explore whether there are times when argumentation is appropriate, and if it is, how feminists can argue in a more authentic feminist voice. In so doing I posit a model of good faith argumentation which I feel is an important step in improving feminist arguments concerning abortion. This model suggests that good faith arguments in the abortion debate must consider both women's well-being and the value of prenatal life. I then apply my discussion of dialogue and good faith argumentation to the kinds of arguments that feminists and others made in *William Webster v. Reproductive Health Services*<sup>13</sup> concerning whether *Roe v. Wade* should be overturned and abortion-policy decisions left to the state legislatures for determination.<sup>14</sup> Finally,

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<sup>13</sup> 109 S. Ct. 3040 (1989).

<sup>14</sup> The Appellants presented seven questions for review by the Supreme Court in

I apply these same principles in examining the *Webster* decision itself.

Although the Court in *Webster* considered but did not resolve the issue of whether *Roe* should be overturned,<sup>15</sup> we can be sure that the question will be before the Court again soon.<sup>16</sup> Whether and how feminists should ask courts (rather than legislatures) to resolve abortion policy issues continue to be important questions for feminists to consider. I tentatively conclude that it is appropriate for us, as feminists,<sup>17</sup> to use constitutional argumentation to deal with the abortion issue but that we did not make good

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*Webster*. One issue involved standing; the others were substantive. They involved the question of whether the following aspects of the Missouri statute were unconstitutional: (1) the statute's preamble which declared that life begins at conception and that unborn children have protectable interests in life, health, and well-being, (2) the requirement that a physician determine gestational age, weight, and lung maturity of the unborn child in order to determine whether the fetus was of 20 or more weeks gestational age, (3) the prohibition against using public funds to encourage or counsel a woman to have an abortion not necessary to save her life, (4) the prohibition against any public employee within the scope of his or her employment performing or assisting an abortion not necessary to save the mother's life, and (5) the prohibition against any public facility being used for the purpose of performing or assisting an abortion not necessary to save the mother's life. In addition, the Appellants raised the question of whether the *Roe* trimester approach by which state regulation of abortion services is reviewed should be reconsidered and discarded in favor of the rational basis test. See Brief for Appellants at i-ii, William L. Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief for Appellants]. All of the briefs presented the final issue as a question of how much deference should be given to the legislature to determine what abortion regulations are appropriate. The final issue is the one I emphasize in this Article.

<sup>15</sup> Chief Justice Rehnquist's plurality opinion (which was joined by Justices White and Kennedy) stated:

This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases.

*Webster*, 109 S. Ct. at 3058 (citations omitted). Justice O'Connor agreed with the plurality on this issue. She wrote, "[T]here is no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe v. Wade*." *Id.* at 3060 (citations omitted). *But see id.* at 3067 (Blackmun, J. dissenting) ("The simple truth is that *Roe* would not survive the plurality's analysis, and that the plurality provides no substitute for *Roe's* protective umbrella.")

<sup>16</sup> Indeed, many state legislatures are preparing for the possibility that *Roe* might be overturned. See *infra* note 27.

<sup>17</sup> I did not work on any of the briefs in the *Webster* case, although I was invited to do so. Knowing that so many feminist briefs were going to be filed, I assumed that my feminist perspective would be represented and that the quality of the briefs would be excellent. Since reading the briefs in *Webster* and being disappointed with many of them, I have become more active in legal-political work on abortion in Louisiana. Thus, I use the phrase "we" to describe feminist legal-political work on abortion.

feminist arguments in the *Webster* case—that we not only risked losing the rights gained in *Roe* but we also risked losing our own understanding of the radical, equality-based rights we should be seeking in the abortion area. In sum, feminists can and should do a better job of making radical arguments while engaging in constitutional litigation.

## II. DIALOGUE

### A. *The Importance of Dialogue*

#### 1. The Dialogue/Argument Distinction

In this section, I posit a dichotomy: dialogue and argument. Dialogue refers to conversations in which we may offer an opinion, but are genuinely interested in learning the perspective of the other person. We enter the conversation not to persuade, but to learn. Leonard Swidler, a theologian committed to promoting interfaith dialogue, offers the following definition of dialogue:

Dialogue of course is conversation between two or more persons with differing views, the primary purpose of which is for each participant to learn from the other so that both can change and grow. Minimally, the very fact that I learn that my dialogue partner believes “this” rather than “that” changes my attitude toward that person; and a change in my attitude is significant change and growth, in me. We enter into dialogue, therefore, so that *we* can learn, change, and grow, not so that we can force change on the *other*.

. . . Dialogue is *not* debate. In dialogue each partner must listen to the other as openly and sympathetically as possible, in an attempt to understand the other's position as precisely and, as it were, as much from within, as possible.<sup>18</sup>

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<sup>18</sup> Leonard Swidler, *Interreligious and Interideological Dialogue: The Matrix for All Systematic Reflection Today*, in *TOWARD A UNIVERSAL THEOLOGY OF RELIGION* 6 (Leonard Swidler ed. 1987). See also Leonard Swidler, *Toward Judeo-Christian-Buddhist Dialogue*, in *BUDDHISM MADE PLAIN: AN INTRODUCTION FOR CHRISTIANS AND JEWS* xiii (Antony Fernando & Leonard Swidler eds. 1985). See also Ruth Colker, *Feminism, Theology, and Abortion*, 77 CAL. L. REV. 1013, 1034–35 (1989) for further discussion of Swidler's perspective on dialogue.

The key to dialogue, as defined by Swidler, is openness and empathy. In contrast, argument refers to verbal statements in which we offer an opinion for the purpose of persuasion, not for the purpose of changing our own viewpoint.

In offering the dichotomy between dialogue and argument, I know it is necessarily artificial. It is possible both to learn and to persuade; it is possible for conversations to interweave both types of conversation simultaneously. In addition, there may be other styles of communication that do not fit my definition of dialogue or argument. For example, rhetoric may be neither dialogue nor argument because it is neither open to others nor meant to persuade. At their extremes, however, the two styles offer different approaches and goals.

## 2. The Relationship of Dialogue to Feminism

Dialogue is deeply feminist.<sup>19</sup> It has helped women break the silence about their lives and question men's ability to have "right" answers with "universal" application. Instrumentally, it has been a tool for overcoming subordination. The short-term benefits of dialogue are obvious when women engage in consciousness-raising and cry from the joy of hearing their experiences as women described, validated, and almost understood.

In addition, some feminists have even suggested that argumentation is rarely appropriate.<sup>20</sup> As litigators, many of us may have experienced winning a debate or case, knowing that our opponent failed to make some of the best arguments available to him or her. We know that we won because we made "better" arguments

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<sup>19</sup> Some women of color, however, have argued that favoring dialogue over argumentation is a perspective more consistent with the socialization of white women than of women of color because women of color have learned to channel anger in positive directions. See, e.g., AUDRE LORDE, *The Uses of Anger: Women Responding to Racism*, in *SISTER OUTSIDER* 124-33 (1984). At the same time, other women of color have emphasized the importance of dialogue. For example, bell hooks, relying in part on the work of the theologian Paulo Freire, argues that leaders of the feminist movement "should have the ability to show love and compassion, show this love through their actions, and be able to engage in successful dialogue." BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 161 (1984).

<sup>20</sup> Cf. Rita Gross, *Feminism From the Perspective of Buddhist Practice*, 1 *BUDDHIST-CHRISTIAN STUDIES* 73, 78 (1981) (suggesting that feminists should avoid angry, hard-edged, or ideological arguments). See also Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 1036 for a discussion of Gross' recommendation that feminists do away with rhetoric.

than our opponent and not because we achieved litigation's avowed goal of moving towards the "truth."

Even if it is true that argumentation has inherent limitations, we still may find ourselves needing to engage in argumentation because of the specific challenges of certain contexts.<sup>21</sup> The key to determining when argumentation is appropriate is to be sensitive to context. This seems to me to be an especially important question for us, as women, because we are socialized to listen and not be heard;<sup>22</sup> we live in a world in which men often seem ignorant of our lives while we know theirs all too well. If the purpose of dialogue is for us to learn from others, rather than to impose our viewpoint on others, then it is easy to imagine how calls for dialogue could help perpetuate women's subordination.

In sum, both dialogue and argumentation can be important and valuable. The important point is to be aware of the shortcomings of each mode of discourse and to consider context carefully when deciding which mode to use.

### *B. Application of Dialogue to Law and Politics: Locating the Proper Forum for Dialogue*

As the previous discussion illustrates, the importance of engaging in dialogue seems to be accepted by many members of the feminist community. Three other general perspectives that favor dialogue include the democratic, religious, and critical perspectives, although some people support dialogue from all three perspectives. In this section, I will explore each of these perspectives and highlight the disagreements within each on the practical application of that perspective to the role of the courts, specifically in the context of the abortion controversy. Based on

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<sup>21</sup> There are also times when we are forced to choose silence over both dialogue and argumentation. For example, there have been times when I have been accosted or insulted by a man on the street, and I have chosen silence out of fear. Engaging in dialogue, despite my religious-feminist sensibility, has not occurred to me. On other occasions, when a man has yelled a derogatory expression at me, I have yelled a derogatory epithet back, despite my fear of his violence. I have chosen to speak angrily, not because I wanted to learn from him, but because I wanted him to learn from me.

<sup>22</sup> For an excellent discussion of this problem, see CATHERINE KELLER, *FROM A BROKEN WEB: SEPARATION, SEXISM AND SELF* (1986); ADRIENNE RICH, *ON LIES, SECRETS AND SILENCE* (1979).



a critical examination of arguments made by each perspective and upon my earlier discussion of the importance of dialogue to feminism, I will develop principles that we can use in determining how and when to engage in argumentation rather than dialogue.

## 1. Democratic Perspective

The democratic perspective contends that it is good for society to engage in constructive dialogue. The former Solicitor General utilized this perspective in *Webster v. Reproductive Health Services* to argue for judicial restraint.<sup>23</sup> He stated that it is important that a “constructive” rather than “inflammatory” dialogue take place in the legislature on the abortion issue and that judicial restraint is needed to facilitate that dialogue. He said:

As long as the various factions continue to look to the courts, however, a constructive dialogue will be impossible.[15]

n.15: The Court's continuing effort to oversee virtually all elements of the abortion controversy has seriously distorted the nature of abortion legislation. Because *Roe* and its progeny have resolved most of the central questions about the permissible scope of abortion regulation, legislative action in this area has been relegated to relatively peripheral issues. And because legislators know that whatever they enact in this area will be subject to de novo review by the courts, they have little incentive to try to moderate their positions. The result, all too often, has been statutes that are significant primarily because of their highly ‘inflammatory’ symbolic content—such as fetal description requirements and human disposal provisions. *Thornburgh*, 476 U.S. at 762 n.10. This process has undermined the accountability of legislative bodies, and has disserved the courts and the Constitution. As James Bradley Thayer once observed, the “tendency of a common and easy resort” to the power of judicial review “is to dwarf the political capacity of the people, and to deaden

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<sup>23</sup> See Brief for the United States as Amicus Curiae Supporting Appellants, William L. Webster v. Reproductive Health Services 3, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief for the United States]. See also Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 1073 for a brief discussion of this point.

its sense of moral responsibility." J.B. Thay, *John Marshall* 106-07 (1901).<sup>24</sup>

Judicial restraint, he argued, would move us closer to constructive dialogue because it would force legislatures to respond to the abortion issue responsibly rather than through inflammatory legislation that they know will be overturned by the courts.

The Appellees in *Webster* did not dispute the importance of constructive dialogue on the abortion issue; they disagreed with the Appellants about the effect the Court's decision in *Webster* would have on that dialogue in the legislatures. They argued that overturning *Roe* would contribute to rather than abate inflammatory legislation in the abortion area:

The Solicitor General notes the tendency of some state legislatures to enact "inflammatory" abortion statutes and remarkably blames *Roe* for this phenomenon. S.G. Brief at 21 n.15. A more honest assessment would blame hostility in those legislatures to a woman's right to choose abortion. That assessment indicates that if *Roe* is eliminated, inflammatory legislation will not abate, but will flourish unchecked. Indeed, five states have announced their intention to criminalize abortion (except only to save the life of the mother) if and when this Court permits them to do so.<sup>25</sup>

They argued that judicial activism is needed to moderate the inflammatory dialogue of the state legislatures.

As I have argued in another article,<sup>26</sup> I think it is clear that the Appellees are correct as to the likely effect of the Court reversing *Roe* and leaving the abortion issue to state legislatures. Five state legislatures already have enacted legislation that will criminalize abortion if *Roe* is overturned.<sup>27</sup> The former Solicitor General recognizes that such a response to the overturning of *Roe* would not reflect constructive dialogue, yet he apparently did not take

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<sup>24</sup> *Id.* at 21 & 21 n.15.

<sup>25</sup> Brief for Appellees at 17-18 n.30, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief for Appellees].

<sup>26</sup> See Ruth Colker, *Abortion and Dialogue*, 63 TUL. L. REV. 1363 (1989).

<sup>27</sup> These states are Idaho, Kentucky, Louisiana, Illinois, and South Dakota. See Brief for Appellees, *supra* note 18, at 18 n.30.

seriously the possibility that state legislatures would act on their stated intentions if *Roe* were overturned.

Our experience with the abortion issue in United States federal and state legislatures, however, should convince us that legislatures would follow through on their stated intentions and engage in inflammatory rather than constructive dialogue. Congress' behavior can be predicted by its coverage of abortion under Medicaid. The Supreme Court's decision in *Patricia R. Harris v. Cora McRae*<sup>28</sup> gave Congress wide discretion in creating rules with respect to funding abortions for poor women under Medicaid. At the time *Harris* was decided Congress was providing Medicaid funding for abortions when a pregnancy resulted from rape or incest, or when the woman's life was endangered as a result of the pregnancy. At issue in *Harris* was the constitutionality of an earlier version of the Hyde Amendment that had provided funding only when the woman's life was in danger. According to the former Solicitor General, we can determine whether constructive dialogue has taken place by seeing if the United States "is out of step with the legislative judgment of virtually every other country with which we share a common cultural tradition . . . ."<sup>29</sup> Using this standard, therefore, we should be able to see whether *Harris* led to constructive dialogue by comparing legislation in the United States with that of other western countries. The governments of nearly every other western country currently fund broad categories of therapeutic abortions for poor women.<sup>30</sup> In sharp contrast, Congress has responded to its legislative freedom by cutting back even further on the categories of abortions that would be funded by Medicaid—eliminating funding for pregnancies that result from rape and incest and preventing the District of Columbia from using its own tax dollars to fund therapeutic

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<sup>28</sup> 448 U.S. 297 (1980).

<sup>29</sup> Brief for the United States, *supra* note 23, at 23.

<sup>30</sup> Countries that provide for or subsidize all legally indicated abortions from public funds include Australia, Austria, Britain, Canada, Denmark, France, West Germany, Greece, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and Switzerland. See Brief of *Amici Curiae* International Women's Health Organizations in Support of Appellees at 14 n.50, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief of International Women's Health Organizations]. See also Rebecca J. Cook, *International Dimensions of the Department of Justice Arguments in the Webster Case*, 17 L., MED. & HEALTH CARE 384, 386-87 (1989).

abortions for poor women.<sup>31</sup> The United States has moved well below the level of concern for women's well-being that has been established elsewhere in the western world. Thus, under the Solicitor General's own test, I would say that our experience with the abortion issue not only shows that we cannot trust Congress if *Roe* is overturned but also that it is time to reconsider our confidence in Congress and overturn *Harris v. McRae* so that the United States can begin to move toward a more humane level of health care. As this discussion shows, Congress has proven itself incapable of engaging in constructive dialogue on the abortion issue.<sup>32</sup>

Similarly, many state legislatures provide no room for optimism with respect to the abortion issue. For example, Louisiana first responded to *Webster* in the legislature by trying to reinstate its criminal abortion statute, which provides for a penalty of a ten-year prison term for a doctor who performs an abortion.<sup>33</sup> It then supported the efforts of District Attorney Harry Connick to reinstate Louisiana's criminal abortion statute through litigation since the criminal abortion statute had never been repealed.<sup>34</sup> It was only through successful legal argument that those efforts failed.<sup>35</sup> Rather than create more constructive dialogue, the *Webster* decision has fueled new attempts to circumvent normal legislative processes in Louisiana in order to institute a criminal abortion statute.<sup>36</sup> Thus, while some states' attempts to enact restrictive

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<sup>31</sup> H.R. CONF. REP. 1013, 100th Cong., 2d Sess., 134 CONG. REC. H9174-85 (daily ed. Sept. 30, 1988).

<sup>32</sup> It is true that Congress recently tried to expand Medicaid coverage for abortion to include rape and incest, but President Bush vetoed that effort. (Irvin Molotsky, *As Expected, Bush Vetoes Bill That Would Pay for Some Abortions*, N.Y. Times, Oct. 22, 1989, § 1, at 32, col. 3). Those efforts received much publicity and were heralded as an enormous victory. But realistically, those efforts, even if they had been successful, would have still left the United States far behind the rest of the western world and no further ahead than at the time of the *Harris v. McRae* decision. Congress' action was therefore more symbolic than substantive and gives us little reason to be optimistic about Congressional action in the area of abortion.

<sup>33</sup> See La. H. Con. Res. 10 (Regular 1989). See also Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 83, for a further discussion.

<sup>34</sup> See *Linda Faye Weeks v. Harry Connick*, No. 73-469 (E.D. La.) (motion under Federal Rule 60(B)(5) to dissolve the court's injunction against enforcement of Louisiana's criminal abortion statute denied January 23, 1990).

<sup>35</sup> *Id.*

<sup>36</sup> Similarly restrictive abortion regulations have been passed in other states like Pennsylvania. See *Pennsylvania Abortion Limits Become Law*, N.Y. Times, Nov. 19, 1989, at A38, col. 5.

abortion legislation have been unsuccessful, as in Florida,<sup>37</sup> the responses of states like Louisiana demonstrate that states are not necessarily the proper fora for abortion policy decisions at this point in our history.

We also should not exaggerate the importance of recent pro-choice legislative victories in assessing the relationship between judicial activism and dialogue. If we, as a society, had not been forced by the courts to live in a pro-choice regime for seventeen years, women would probably not be fighting so hard at the present moment to keep those rights through the legislative process. Having experienced how reproductive freedom has dramatically improved their lives, women have come to realize the importance of articulating pro-choice arguments to legislatures. Thus, judicial activism can play an important role in adjusting social attitudes while pre-empting legislative decisionmaking for a while.

In sum, arguments for judicial restraint in the abortion area are unsatisfactory when they flow from an unqualified argument favoring democracy. Whether judicial restraint leads to constructive dialogue is a question that must be answered contextually.

Unqualified arguments for democracy also fail to acknowledge the historical significance and importance of the fourteenth amendment in safeguarding the needs of women and racial minorities. The purpose of strict judicial scrutiny and judicial activism under the fourteenth amendment is to protect minorities that do not have effective access to the political process from discriminatory state action.<sup>38</sup> Our experience with abortion regulations suggests that women, especially poor women, likewise do not have sufficient access to the political process to safeguard their well-being at the local or national level. Thus, as I will discuss later, I consider it important to construct equality-based arguments under the fourteenth amendment to demonstrate why

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<sup>37</sup> See R.W. Apple, Jr., *An Altered Political Climate Suddenly Surrounds Abortion*, N.Y. Times, Oct. 13, 1989, at A1, col. 4.

<sup>38</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4. See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 167 (1980) (suggesting that laws containing sex classifications that were enacted prior to women's suffrage should be invalidated). Interestingly, Ely failed to apply this same analysis to the nineteenth century abortion law that was at issue in *Roe*. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

our democratic-constitutional regime should not tolerate state legislatures' enacting abortion restrictions which disregard the well-being of women.

## 2. Religious Perspective

The religious perspective also asserts that dialogue is good for society. This perspective is described by Professor Michael Perry. He states:

Any moral community for which love of neighbor (agape) is a constitutive ideal . . . should understand that ecumenical openness to the Other in discourse facilitates (as well as expresses) such love: I can hardly love the Other—the real, particular other—unless I listen to her and, in listening, gain in knowledge of her.<sup>39</sup>

Perry suggests that we should engage in dialogue because dialogue facilitates our developing a truly loving society.

However, religious proponents of dialogue also disagree on where such dialogue is best facilitated. Perry, who supports a nonoriginalist interpretation of the Constitution, argues for judicial restraint in the abortion context to enhance legislative dialogue.<sup>40</sup> Perry endorses a particular kind of dialogue, a “deliberative, transformative dialogue”—“one in which the questions of what ought we to want and, therefore, who ought we to be are open, not closed.”<sup>41</sup> In contrast, also speaking from a religious perspective, Catholics for a Free Choice supported judicial activism in *Webster* to enhance moral reflection throughout society: “It is contrary to Catholic moral tradition to cut off debate, decision and reflection on a subject or [sic] moral significance by

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<sup>39</sup> MICHAEL PERRY, *MORALITY, POLITICS AND LAW: A BICENTENNIAL ESSAY* 51–52 (1988). See also Colker, *Abortion and Dialogue*, *supra* note 26 (reviewing Perry's book and discussing these points in greater detail).

<sup>40</sup> *Id.* at ch. 6.

<sup>41</sup> *Id.* at 152.

legislative fiat.”<sup>42</sup> Professor Perry and Catholics for a Free Choice ground their arguments in a similar moral perspective yet they reach different conclusions about how to achieve their goals for society. Perry believes that the evil to be overcome is the “imperialism” of the judiciary;<sup>43</sup> Catholics For a Free Choice believe the evil to be overcome is “legislative fiat.”

The problem with Perry’s perspective is that he speaks broadly about the universal importance of legislative dialogue without considering the concrete realities of a given situation. As I suggested above, it is not likely that legislatures would have engaged in “deliberative, transformative dialogue” if the Supreme Court had acted with more restraint in *Roe*. We would have instead witnessed legislatures disempowering women, especially poor women. Because Perry’s democratic argument fails in the specific context of abortion, we are left with only his religious assertion about the beneficial effects of being open to others’ viewpoints. As Catholics for a Free Choice points out, that argument can support judicial activism to prevent “legislative fiat” as well as judicial restraint to prevent “judicial imperialism.”

### 3. Critical Perspective

The critical perspective also favors dialogue, but it searches for ways to engage in dialogue in a radical rather than liberal voice.<sup>44</sup> However, critical theorists disagree on what form this dialogue should take.

For example, some critical theorists argue that constitutional discourse is essentially liberal. Many feminists and leftist people in Canada, relying on this critical perspective, oppose using the Charter to achieve change in society. One proponent of this perspective, Professor Judy Fudge, argues that constitutional ar-

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<sup>42</sup> Brief for Catholics for a Free Choice, Chicago Catholic Women, National Coalition of American Nuns, Women in Spirit of Colorado Task Force, *et al.*, As *Amici Curiae* in Support of Appellees at 25–26, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief for Catholics for a Free Choice].

<sup>43</sup> See PERRY, *supra* note 40, at 172; See also Colker, *Abortion and Dialogue*, *supra* note 26, at 1375; Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 1073–74.

<sup>44</sup> See, e.g., CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed. 1989); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed. 1982).

guments co-opt feminist arguments into abstract liberal arguments, undermine democracy, and enhance authoritarianism. She states:

Feminist demands can be accommodated with the formal notions of equality or the negative concept of autonomy which are a part and parcel of liberal rights, but by celebrating the *Charter* feminists risk legitimating abstract rights which have been used to attack legislation which redistributes power, however marginally, from the powerful to the disadvantaged. The problem with endorsing *Charter* litigation as a terrain of progressive struggle is that it requires the concrete to be translated into the abstract, while simultaneously transferring power away from institutions which are in principle democratic to institutions which are by definition authoritarian.<sup>45</sup>

She suggests that the Canadian Charter is not the best vehicle for achieving feminist goals.

Professor Michael Mandel, also a Canadian, argues against using the Charter for change in society in even stronger terms, emphasizing the inherently authoritarian nature of constitutional discourse. Mandel says:

Then there is the authoritarian nature of the courts which makes the whole thing not only dishonest but also demeaning. *Pleading* is not a democratic form of discourse. It dates from a time when democracy was a dirty word. Expanding that form of discourse to more and more corners of life, as the Charter does, is in effect seeking to return to that time. I do not like the idea of going backwards in history. The courts try to instill in us an acceptance of arbitrary hierarchy, a one-way respect that is not based on whether it is deserved but on the (literally) elevated position of the person we are supposed to respect. The Charter exalts courts even more. I think they should be cut down to size.<sup>46</sup>

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<sup>45</sup> Fudge, *The Public/Private Distinction*, *supra* note 5, at 551 (citations omitted).

<sup>46</sup> Mandel, *supra* note 6, at ix-x.



Thus, Mandel rejects the arbitrary hierarchy of the courts in general, and constitutional discourse in particular.

While Fudge and Mandel use critical perspectives to argue against the use of constitutional argumentation, other critical scholars in the United States do not share their pessimistic perspective on constitutional discourse. For example, Professor Mari Matsuda disputes the validity of the dichotomy between making constitutional arguments and retaining a radical perspective on social change.<sup>47</sup> She argues that by using the Constitution, women and people of color can transform the Constitution itself into a more radical document. For example, she notes that Frederick Douglass eventually rejected his initial belief that the Constitution was "a corrupt document that endorsed slavery" and argued instead that the Constitution contained a "ringing indictment of slavery."<sup>48</sup> Douglass may not have been successful in imbedding that meaning in the Constitution in his lifetime, but Martin Luther King, Jr. and his followers were able to draw a more radical meaning out of the Constitution in the twentieth century.<sup>49</sup> Matsuda concludes from these and other examples that "[t]his ability to adopt and transform standard texts and mainstream consciousness is an important contribution of those on the bottom."<sup>50</sup> Rather than assume, as do Fudge and Mandel, that the constitutional text is bound by its original, liberal meaning, Matsuda argues that women and people of color can be a part of a process that transforms the Constitution into a more radical document.

Matsuda offers a powerful example of using liberal, constitutional arguments without being co-opted. She points to efforts by third-generation Japanese Americans to delegitimize the internment of Japanese Americans during World War II through arguments based on the Bill of Rights. Having been interned during the Second World War in a tragic disregard for basic human and civil rights, they later demanded their basic human rights through rights-based constitutional discourse. Despite the fact that Japanese Americans have continued to pursue rights-based, legalistic

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<sup>47</sup> Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

<sup>48</sup> *Id.* at 334.

<sup>49</sup> *Id.* at 334-35.

<sup>50</sup> *Id.* at 335.

claims, Matsuda insists that they have not abandoned their hopes of radical social change.<sup>51</sup> On the one hand, they work within the legal system using rights-based arguments, while on the other, they engage in radical work within the political community, such as seeking reparations and other changes. She argues that the life experience of people of color shows that one can have "dual consciousness"—using rights language while recognizing the idea of legal indeterminacy.

Matsuda's work values the role that women and people of color can have in creating meaning in society—a role that is essential to constructive dialogue.<sup>52</sup> Her disagreement with Fudge is both practical and historical. Fudge cites numerous examples where she contends that constitutional arguments by feminists in Canada have been corrupt feminist arguments and not part of radical social change.<sup>53</sup> Matsuda, on the other hand, cites numerous examples where she contends that constitutional arguments by people of color in the United States have been a part of radical social change.<sup>54</sup> The conclusion we can draw from both is that we need to be sensitive to context when we consider whether constitutional arguments are inherently corrupt or potentially radical.

This examination of various perspectives on dialogue suggests that the decision whether to look to courts or legislatures for constructive dialogue depends upon context. As I have suggested, achieving constructive dialogue is a goal that is especially important for feminists. Thus, whether feminists should turn to the legislatures or to the courts to advance their concerns depends on the issue at hand and the historical circumstances surrounding it. As we have seen, we have little reason to be optimistic about the ability of the legislatures to engage in constructive dialogue in the context of abortion. Matsuda's work suggests that feminists with a radical agenda might do well to look to constitutional argumentation in contexts such as this. The question which remains, however, is how to argue when we do resort to the courts.

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<sup>51</sup> *Id.* at 340.

<sup>52</sup> Leonard Swidler lists criteria which are essential to constructive dialogue; respecting the voices of disadvantaged people in society is central to his framework for dialogue. See *supra* note 18 for a listing of Swidler's works.

<sup>53</sup> See Fudge, *The Public/Private Distinction*, *supra* note 5.

<sup>54</sup> See *supra* note 47.

### III. ARGUMENT

#### *A. Incorporating Aspects of Dialogue into Feminist Arguments*

In the previous section I concluded that there are times when argument is more appropriate than dialogue. A further question to consider, however, is whether when we do engage in argumentation, we can do so in a more "dialogical" way. That is, is it possible to frame arguments that maintain an openness to the other side?

This question is especially important for feminists given feminism's recognition of the problem of consciousness.<sup>55</sup> Much of feminist theory recognizes that all viewpoints are inherently subjective and purports to be very cautious in knowing the "right answer."<sup>56</sup> Feminists emphasize the continual need for women to engage in consciousness-raising,<sup>57</sup> knowing that women cannot at this time be truly confident that they see accurately their position in society.

The problem of consciousness has made some feminists struggle with the question of whether feminism is doomed to a hopeless moral relativism, unable to take positions on any issues. In response, Zillah Eisenstein suggests that a feminist recognition that there is no objective truth should not stop us from acting based on our world view; rather she suggests that "[w]e must leave meanings open at the same time that we act upon them."<sup>58</sup>

An approach that denies the possibility of objective truth and insists upon the need to maintain openness makes it difficult to justify the strong, forceful tone of legal argumentation. This difficulty is apparent in comparing Professor Martha Minow's aca-

<sup>55</sup> See, e.g., CATHARINE MACKINNON, *Afterword*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 216 (1978).

<sup>56</sup> See, e.g., Martha Minow, *Foreward: Justice Engendered*, 101 HARV. L. REV. 10 (1987); SONIA JOHNSON, *GOING OUT OF OUR MINDS: THE METAPHYSICS OF LIBERATION* 320-21 (1987).

<sup>57</sup> This is a central tenet of Catharine MacKinnon's work. She has called consciousness-raising the methodology of feminist theory. See generally CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83-105 (1989). See also Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 1034 for a discussion of dialogue as a technique of consciousness-raising.

<sup>58</sup> ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* 24 (1988).

demic and legal work. On the one hand, Minow argues in a law review article that when we take a position, we must remain open to the possibility that on another occasion our opponents may convince us that they are right.<sup>59</sup> Her academic tone is cautious, apparently reflecting her belief that there is no objective truth and that we must maintain openness in articulating our viewpoint. On the other hand, Minow argued in a brief in *Webster* that the Missouri abortion statute was unconstitutional because it violated freedom of religion.<sup>60</sup> This criticism was not cautious; it was forceful and apparently confident of its accuracy. Her legal argument about abortion does not appear consistent with her academic perspective about how to represent a point of view.

Some might say that an open voice is inappropriate for the courtroom—that there is no harm in speaking firmly in the courtroom and openly in an academic context. However, I reject that dichotomy. I believe that feminists can afford to speak in a more open voice in the courtroom. This conviction emerges from a consideration of Professor Lynne Henderson's writing.<sup>61</sup> Henderson argues that feminists can maintain an open, empathetic perspective while also using the courts to make legal arguments. She focuses on the need for legal arguments to be couched in empathy:

Empathy may enable the decisionmaker to see other "right" answers, or a continuum of answers. Or it may simply make the decisionmaker aware that what once seemed like no choice or a clear choice is instead a tragic one. To mask the tragedy of choice by taking refuge in rules does not negate the tragedy.<sup>62</sup>

<sup>59</sup> Minow, *supra* note 56, at 93.

<sup>60</sup> See Brief Amicus Curiae for American Jewish Congress, Board of Homeland Ministries—United Church of Christ, National Jewish Community Relations Advisory Council, The Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, The Religious Coalition for Abortion Rights, St. Louis Catholics for Choice, and 30 other religious groups, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief for Religious Groups].

<sup>61</sup> See, e.g., Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987). See also Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 20–21 for a further discussion of Henderson's approach.

<sup>62</sup> Henderson, *supra* note 61, at 1653. See also Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 1030.

Thus empathy can help one see one's own as well as the other's position more clearly.

Henderson's approach provides us with a framework through which we can argue that our opponent is wrong yet also recognize that our own position has tragic aspects. For example, I find it commonplace in personal discussions about abortion for feminists to acknowledge that abortion is a tragic choice. Nevertheless, I have never found empathy to be a part of any of the legal arguments constructed by feminists on the abortion issue that I have examined.<sup>63</sup>

The lack of empathy in feminist arguments against state regulation of abortion actually weakens the arguments. Feminists usually respond to the emotional images of fetal life presented by pro-life advocates with silence. They fail to address why we as a society regretfully must terminate that life to protect women's well-being and instead talk about women's well-being as if the reader is not struggling with the question of how to protect the value of prenatal life. However, if the court and many Americans were *not* struggling with that question, then there would not be a legal controversy.

In addition, the traditional pro-choice argument about abortion is a liberal privacy argument that defends a woman's right to choose an abortion as part of her individual autonomy. That argument, although successful in the courts for seventeen years, is not the best available argument because it makes it appear as if the pro-life movement is standing on higher moral ground because it is concerned about broad social welfare while feminists are concerned about liberal individualism and not about social welfare.<sup>64</sup>

As Zillah Eisenstein has persuasively argued, feminist theory is implicitly group-based; feminist theory cannot be embedded in liberal individualism because it necessarily recognizes that women are a sex-class.<sup>65</sup> Thus, the pro-choice position stands in tension with feminist theory. It was a pragmatic argument that

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<sup>63</sup> For an example of an empathetic abortion argument, see discussion of Justice Wilson's opinion in *Morganteler infra* in Section III(C)(2).

<sup>64</sup> For elaboration of this point, see KATHLEEN McDONNELL, *NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION* (1984). See also Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 1030.

<sup>65</sup> See ZILLAH EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* (1981).

was crafted to win the *Roe* case because it seemed compatible with liberal constitutional law.<sup>66</sup> Rather than risk being further co-opted by our possibly misguided sense of what is good constitutional law, I suggest that feminists need to start constructing more authentically feminist arguments in the abortion area. Pro-choice arguments have become so commonplace in feminist discussions of abortion that I am afraid that feminists have lost sight of the implicitly nonfeminist aspect of that argument. Feminists need to replace the phrase "pro-choice" with a phrase that is more centrally "pro-women."

### *B. Defining Good Faith Disagreements*

The preceding discussion suggested that feminists need to incorporate elements of dialogue into their legal arguments. In this section I explore more fully the relationship of dialogue to legal argumentation and posit a model which I feel is important to follow in framing our arguments.

As the discussion of various perspectives on dialogue illustrated,<sup>67</sup> there is no agreement on the relationship between judicial activism and achieving dialogue. Yet, there is agreement that the dialogue we should be seeking is "constructive," "transformative," in "good faith" or "respectable." However, few attempts are offered to define these various terms. Neither the Solicitor General nor the Appellees in *Webster* attempted to define what they meant by constructive or inflammatory dialogue. The brief by Catholics for a Free Choice defined something as the subject of "respectable debate" simply in terms of whether various authorities hold the position:

A moral option comes within respectable debate if it is supported by serious reasons which commend themselves to many people, and if it has been endorsed by a number of authorities in the field of ethics, and if it has been approved

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<sup>66</sup> See generally Henderson, *supra* note 61, 1620-31.

<sup>67</sup> See *supra* Part II(B).

by reputable religious and other humanitarian bodies. D. Maguire, *The New Subversives* 121 (1982)<sup>68</sup>

Thus, Catholics for a Free Choice offer us no real guidance on what actually makes a debate respectable.

I have found it more useful to try to define the concept of a "good faith" disagreement over which people should attempt dialogue than to work with the term "respectable" which connotes conformity to societal norms. The term "good faith" describes the value of respect which may make dialogue possible even if the speakers do not comport with societal norms.<sup>69</sup> A good faith disagreement is one characterized by respect, both for the people affected by the issue under discussion and for the arguments made on each side of the issue.<sup>70</sup>

The legal dispute over the constitutionality of Japanese American internment during the Second World War, as considered in *Toyosaburo Korematsu v. United States*,<sup>71</sup> exemplifies a disagreement not carried on in good faith. It was not a good faith disagreement because neither the government's position nor the way in which the position was articulated by the government attorneys reflected respect for the well-being of Japanese American people.

The government's position reflected a lack of respect for the Japanese American people because the government had no evidence that *any* Japanese American had committed an act of sabotage; it argued for internment simply by relying on the stereotype that Japanese Americans would be more loyal to Japan than to the United States.<sup>72</sup> Second, the government's lack of respect

<sup>68</sup> Brief for Catholics for a Free Choice, *supra* note 42, at 26.

<sup>69</sup> See Colker, *Feminism, Theology, and Abortion*, *supra* note 18 for a further discussion of this point.

<sup>70</sup> See Colker, *Abortion and Dialogue*, *supra* note 26, at 1 n.1 for an expanded definition of good faith disagreement.

<sup>71</sup> 323 U.S. 214 (1944).

<sup>72</sup> The only evidence of "disloyalty" offered by the government and accepted by the Court to justify the internment was the following: "Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan." *Korematsu*, 323 U.S. at 219. The first piece of "evidence" referred to the fact that Japan recognized dual citizenship, which some individuals desired. The second piece of "evidence" referred to how Japanese Americans *responded* to the internment; not surprisingly, some of them responded by wanting to leave the United States. (For an excellent critique of the *Korematsu* decision, see Justice Murphy's dissent. *Id.* at 233-42.) It would have been unthinkable for German Americans to have

for the well-being of Japanese Americans is apparent in statements made about the case by government lawyers.<sup>73</sup> Herbert Wechsler, for example, made the following statement about *Korematsu* in his seminal 1959 law review article on the use of "neutral principles":

Only the other day I read that the Japanese evacuation, which I thought an abomination when it happened, though in the line of duty as a lawyer I participated in the effort to sustain it in the Court, is now believed by many to have been a blessing to its victims, breaking down forever the ghettos in which they had previously lived.<sup>74</sup>

Notice the lack of respect for Japanese Americans reflected in Wechsler's comments: he supposedly thought the internment (which he mislabels an "evacuation") was an abomination when it happened, yet he participated in the government's fraudulent behavior by constructing arguments in favor of it; he refers to Japanese Americans as "Japanese" as if they were not Americans; and he readily accepts as true a newspaper story that claimed that breaking up and interning a community was a good way to disperse a population throughout society.

Matsuda, by contrast, offers a more accurate and respectful description of the effects of the internment on Japanese Americans:

Many interned families lost homes and possessions in bargain basement evacuation sales, while others lost property in racially motivated escheat trials promoted by the California government. Farm families that had spent generations

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been interned out of concern that they would be loyal to Germany rather than to the United States; however, it was exactly that kind of ethnic/national stereotyping that led to the internment of Japanese Americans.

<sup>73</sup> In addition, the implausibility of the government's position in *Korematsu* seems obvious today when, even former President Reagan, who was never famous for his sensitivity to minority rights, agreed to compensate Japanese Americans for their injury from internment. Moreover, Chief Justice Earl Warren, who had supported the internment when he was governor of California, wrote in his memoirs that he "deeply regretted" the internment and thought that it demonstrated "the cruelty of war when fear, get-tough military psychology, propaganda and racial antagonism combine." Matsuda, *supra* note 47, at 363 n.161 (quoting THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 149 (1977)).

<sup>74</sup> See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 27 (1959) (citations omitted).



reclaiming unusable land lost the fruits of their toil. Even more devastating than the loss of property was the loss of opportunity. Many of the Issei, or first-generation immigrants, were deprived of their most productive years, the period when their hard work, experience and careful investments might have yielded the financial security that many were never able to achieve after internment.<sup>75</sup>

Matsuda's description illustrates an attempt to inject an element of good faith into the debate over the Japanese American internment by viewing the controversy through the eyes of Japanese Americans.

In sum, my definition of good faith dialogue is embedded in concrete reality, not abstract imaginings of a world in which we do not live.

### *C. Application of Good Faith Argumentation to the Abortion Issue*

In this section, I will illustrate how good faith arguments could be made concerning the abortion issue. Assume that two people disagree about the appropriateness of the legislature restricting abortions. I argue that this disagreement is not in good faith if either party does not respect the well-being of women. In addition, this disagreement is not in good faith if either party does not respect the value of prenatal life. However, that disagreement could be in good faith because people who respect the well-being of women can consider abortion to be immoral and people who consider abortion to be moral can respect the value of prenatal life. Examples of all of these possibilities are readily apparent.

#### 1. Arguments in Favor of Regulation of Abortion

Let us start with the abortion dispute in *Roe v. Wade*. At issue was the constitutionality of a state statute that criminalized abortion except in cases necessary to save the pregnant woman's life. The plaintiff in *Roe* alleged that she was not able to obtain an

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<sup>75</sup> Matsuda, *supra* note 47, at 364-65.

abortion lawfully although she had become pregnant as the result of a rape.<sup>76</sup> The position of Texas in *Roe*, that a state could constitutionally make it a criminal act for a woman to procure an abortion, even when she was the victim of rape, was not made in good faith because it did not reflect respect for the well-being of women.

As I have argued in another article, an individual who respects the well-being of women cannot take the position that the appropriate response to an unwanted pregnancy, especially one which allegedly occurred as the result of a rape, is a lengthy prison term if the woman seeks an abortion.<sup>77</sup> A woman who has become pregnant as the result of a rape has already faced one of the most coercive experiences that a woman can experience in her lifetime. Her person has been invaded on an intimate level. One tragic consequence of this coercive invasion is a pregnancy. If the criminal law's purpose is to deter immoral activity, criminalizing the woman's behavior would not effectively deter immoral behavior. The immoral behavior that has occurred is the rape. Even if one considered the abortion also to constitute immoral behavior, the criminal law could not act as a deterrent since the pregnant woman never intended to have sexual activity which could result in a pregnancy. Alternatively, if the purpose of the criminal law is to penalize an individual for having engaged in immoral activity, it is hard to imagine how this woman is deserving of such punishment. She has already suffered enormously; further suffering through a prison sentence because she could not bear to continue with her pregnancy seems brutally disrespectful of her well-being.<sup>78</sup>

Although evidence of disrespect for women's well-being is probably easiest to see when a state prohibits abortion even in

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<sup>76</sup> See MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 8 (1988). The plaintiff has since recanted her story of rape; however, that does not change the fact that she claimed she had been raped at the time that the original lawsuit was filed, nor did the Court's decision depend on this issue.

<sup>77</sup> See Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 1050-52. See also Colker, *Abortion and Dialogue*, *supra* note 26, at 1379-81.

<sup>78</sup> The United States apparently conceded this point in *Webster* because it stated that if the Court were to adopt an undue burden analysis, "a regulation that prohibits abortion in cases of rape or incest presumably would entail an undue burden, because in such cases, where the pregnancy is the result of coercion, a woman has not been afforded a meaningful opportunity to avoid pregnancy through alternative means." Brief for the United States, *supra* note 29, at 23 n.16.

the case of rape, we can also see that evidence of disrespect starkly by examining the impact of the criminalization of abortion on the lives of poor women. Abortion prohibitions, which are supposedly intended to protect the life of the unborn, actually cost poor women their lives and health.<sup>79</sup> A woman who is poor and faces an unwanted pregnancy knowing she cannot afford to have a child suffers no less than a woman who becomes pregnant as the result of a rape if abortion is criminalized.

Rather than victimize women further when they face an unwanted pregnancy, I would argue that a more respectful approach to unwanted pregnancies would try to change the conditions under which unwanted pregnancies occur, focusing our attention on men's failure to take responsibility for use of birth control and the lack of safe and effective birth control options for men and woman. A more respectful approach would also limit the need for abortions by focusing our attention on how we can make this a better society in which women can bear and help raise children. Rather than "blame the victim," we need to understand that women do not engage in sexual activity in an effort to face an unwanted pregnancy. To prevent abortions we need to break the link between sexual activity and unwanted pregnancy, not punish only the woman after an unwanted pregnancy has occurred.

The lack of respect for women embedded in Texas' position in *Roe* also becomes apparent if one examines the state attorney's statements about women.<sup>80</sup> For example, the State of Texas opened the first set of arguments with the following remark: "Mr. Chief Justice, may it please the Court: It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word."<sup>81</sup>

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<sup>79</sup> See Cook, *supra* note 30, at 389.

<sup>80</sup> As with the Japanese-American internment example, I can also turn to contemporary Republican politics to support my observation. Even President George Bush, an individual not well-known for his sensitivity to women's issues, has taken the position that criminal sanctions against pregnant women who choose abortions is not the appropriate response to the abortion problem. During the presidential campaign, Vice President Bush's spokesperson said, in clarifying the candidate's position, "Frankly, he thinks that a woman in a situation like that [unwanted pregnancy] would be more properly considered an additional victim, perhaps the second victim. That she would need help and love and not punishment." *Bush Camp Offers a Clarified Stand About Abortions*, N.Y. Times, Sept. 27, 1988, at A1, col. 4 & B7, col. 3.

<sup>81</sup> Henderson, *supra* note 61, at 1622, n.303 (quoting from tapes of the oral argument).

These examples show that the disagreement at issue in *Roe v. Wade* was not a good faith disagreement because it was not embedded in minimal respect for women's well-being. I therefore conclude that argumentation in the form of constitutional litigation was an appropriate response to the Texas legislation because real dialogue is not possible when a base of respect does not exist. Nevertheless, the question that remains is how that argumentation could have been conducted in a more authentically feminist voice.

Some religious feminists favor state regulation of abortion but do so in a framework that is sensitive to women's well-being as well as to the value of prenatal life. For example, religious feminist Lisa Sowle Cahill makes an argument for state regulation of abortion that respects the value of women in our society but also recognizes that women should bear some responsibility in our society for protecting life. Under that framework, she supports some regulation of abortion.<sup>82</sup> Similarly, Feminists for Life of America argued in *Webster* that if women were fully informed about the consequences of terminating prenatal life they would choose not to have abortions. They argued that the state can protect both women's emotional health and prenatal life by insisting that women become more fully informed before being able to have an abortion.<sup>83</sup> They attempted to make arguments in favor of state regulation of abortion that included considerations of women's well-being.

Neither Cahill nor Feminists for Life of America favors criminal regulation of abortion, nor do they support a complete ban on abortion. Unfortunately, because their arguments arose in the context of analyzing specific regulations, they do not offer much guidance on what regulations would be acceptable within their frameworks. Nevertheless, while I do not agree with their arguments, the arguments do raise the possibility of making good faith feminist arguments in favor of abortion regulations.

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<sup>82</sup> Cahill, *Abortion, Autonomy, and Community*, in *ABORTION AND CATHOLICISM: THE AMERICAN DEBATE* 85 (Patricia Beattie Jung & Thomas A. Shannon eds., 1988).

<sup>83</sup> Brief of Feminists for Life of America, Women Exploited by Abortion of Greater Kansas City, The National Association of Pro-Life Nurses, Let Me Live, and Elliot Institute for Social Sciences Research, as Amici Curiae in Support of Appellants 26, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief of Feminists for Life of America].

## 2. Arguments Opposing State Regulation of Abortion

Feminists who oppose state regulation of abortion frequently base their arguments on notions of individual autonomy and privacy. Because these feminists fail to respond adequately to the possibility of valuing prenatal life, their arguments are not in good faith. Canadian Professor Judy Fudge's reaction to the opinion of Justice Wilson in *Morganteler, Smoling and Scott v. The Queen* illustrates the traditional pro-choice view.<sup>84</sup> Fudge praises her for echoing the "rhetoric of feminist appeals for reproductive freedom as an element of personal autonomy" and criticizes her for seriously considering the state's interest in protecting prenatal life.<sup>85</sup> As Kathleen McDonnell notes, the pro-choice perspective assumes "that we are all, in some sense, atomized individuals with competing rights, rather than beings whose very existence is rooted in profound interconnections with each other."<sup>86</sup> McDonnell argues that we need to learn how to discuss the abortion issue in a way that "lets in" the fetus.<sup>87</sup> Such a discussion would be communitarian and less liberal.

It would be perfectly possible to develop a radical approach to abortion that is more respectful of the value of prenatal life. We could say that we do need to protect women's well-being and prenatal life, but that at this time in our history, we cannot trust the state when it tries to protect prenatal life. In other words, the state is so disrespectful of women's well-being when it tries to protect prenatal life by, for example, providing criminal sanctions for abortion, that we cannot afford to give the state the power to protect prenatal life. Only when the state develops a consistent historical record of respecting women's well-being can we delegate to the state the power to protect prenatal life. Thus, we could be skeptical about the state's respect for women without discounting the importance of valuing prenatal life.

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<sup>84</sup> 44 D.L.R.4th 385 (1988). In *Morganteler*, the Canadian Supreme Court overturned Canada's abortion statute which had criminalized abortion but made it possible for a committee of physicians to approve therapeutic abortions. A divided Court in several different opinions concluded that the approval process was too arbitrary to serve as the method by which such an important decision was made.

<sup>85</sup> Fudge, *The Public/Private Distinction*, *supra* note 5, at 541.

<sup>86</sup> See MCDONNELL, *supra* note 64, at 53.

<sup>87</sup> *Id.*

In *Morganteler*, Justice Wilson seemed to be struggling to discover a communitarian way to discuss both a woman's right to choose an abortion and the state's interest in protecting prenatal life, illustrating the possibility of a good faith feminist argument about abortion. Although Fudge accuses Wilson of "balancing" the woman's interest against the fetus' interest, that is not necessarily what Wilson did. Wilson did not insist upon any restrictions on a woman's ability to have an abortion. She only suggested that at the point that a fetus becomes viable the state may properly take steps to preserve the fetus' life. It is conceivable that these steps could both protect the woman's ability to have an abortion and the state's interest in preserving fetal life. For example, the state could insist that doctors take all reasonable steps to preserve fetal life during a post-viability abortion. An abortion is only a method to remove the fetus from the woman's body. It does not, by definition, have to result in the death of the fetus. Whether the fetus will also die depends, in part, upon the steps that are taken by medical science to preserve the fetus' life.

One inaccurate assumption that seems to be a part of Fudge's argument is that a woman who has the right to choose an abortion also has the right to choose to terminate the life of the fetus.<sup>88</sup> Morally, however, these two issues can be disconnected. We can think of a woman's right to have an abortion as deriving from her right not to be pregnant rather than from her right to terminate the life of the fetus. It may be the case that the termination of the fetus' life is a necessary consequence of her decision not to continue with the pregnancy. However, she does not have the moral right to insist upon the termination of the fetus' life when she decides not to continue with her pregnancy.

Justice Wilson may have been trying to separate these two issues. She protected a woman's ability to choose an abortion but did not necessarily protect a woman's right to choose to have the life of the fetus terminated. It is Fudge, not Wilson, who considers the abortion issue necessarily to involve a balance between a woman's right to choose an abortion and the state's interest in preserving fetal life. By utilizing a more communitarian

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<sup>88</sup> See Colker, *Feminism, Theology, and Abortion*, *supra* note 18, at 1057.

framework, we might consider the ways in which the state could protect *both* the woman's well-being and the interest in preserving prenatal life, rather than incorrectly assume that the woman's choice of an abortion has no effect on society or others.

In sum, many feminists are not willing to be open to the importance of valuing prenatal life when they summarily dismiss pro-life arguments. I think the abortion controversy would more often be characterized by good faith disagreement if feminists paused to consider the seriousness of the pro-life position. In addition, consistent with Fudge's perspective on the co-optation of radical arguments by liberal approaches, I think that feminists would be less likely to have their perspectives distorted by the judiciary when they make legal arguments if they become more vigilant about what is a truly feminist perspective on an issue like abortion. Feminist abortion arguments should be pro-woman, viewing women as interconnected members of society, rather than pro-choice, viewing each woman as an atomized individual in society.

Religious feminists and socialist feminists sometimes make pro-choice abortion arguments that are respectful of both women's well-being and prenatal life. These arguments are usually sensitive to the historical circumstances affecting women's condition in society rather than being unqualified arguments about a woman's right to have an abortion. For example, Christine Gudorf, a religious feminist, makes an argument against state regulation of abortion that respects the value of prenatal life but also recognizes that it is disrespectful to women to place all the burdens of valuing life, from conception to adulthood, on women.<sup>89</sup> She observes that the Catholic Church is usually more sensitive to historical circumstances when making moral arguments than it has been with respect to abortion. Gudorf suggests that as the Church can generally favor peace yet recognize the necessity of war in the appropriate historical circumstances, it might also generally favor the preservation of prenatal life yet recognize the necessity of abortion in present historical circumstances. Similarly, some Buddhist-feminists argue that women should be al-

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<sup>89</sup> Christine E. Gudorf, *To Make a Seamless Garment, Use a Single Piece of Cloth*, in *ABORTION AND CATHOLICISM: THE AMERICAN DEBATE* 279 (Patricia Beattie Jung & Thomas A. Shannon eds. 1988).

lowed to have abortions but that they should engage in a grieving ritual to mourn the death of the prenatal life.<sup>90</sup> Their view is sympathetic to both women and prenatal life. Finally, Alison Jaggar, a socialist feminist, argues that the feminist position against state regulation of abortion is contingent upon our contemporary social-historical circumstances in which society places all of the burden of bearing and raising children on women.<sup>91</sup>

Feminists can and do make good faith arguments concerning abortion. Feminists can be respectful of women's well-being and the value of prenatal life in discussing the abortion issue. The challenge is to translate this perspective into legal argumentation. As I have suggested, feminists can retain an openness to others while making a legal argument that substantively represents their position. In the next section I examine some of the briefs in *Webster* to see how this aim might better have been achieved.

#### IV. WEBSTER: WHERE'S THE GOOD FAITH FEMINIST LEGAL ARGUMENT?

Although a great number of briefs were filed in support of both the Appellants and the Appellees in *Webster*, very few adequately discussed the impact of abortion and abortion regulations on women's well-being, and almost none of them discussed why we should value prenatal life. The numerous briefs filed on behalf of various feminist organizations were no exception. As I have proposed above, discussion of these issues is essential to constructing good faith feminist arguments on the abortion issue. These briefs can instruct us, as feminists, as to how we should construct constitutional arguments in future cases. Although I do not agree with Professor Fudge that constitutional argumentation necessarily co-opts feminist arguments into liberal arguments, I think there is good evidence of that happening in the abortion controversy.

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<sup>90</sup> See *Buddhist Views on Abortion*, 6 SPRING WIND—BUDDHIST CULTURAL FORUM 166 (1986).

<sup>91</sup> Alison Jaggar, *Abortion and a Woman's Right to Decide*, 5 PHIL. F. 347 (1974).



While *Webster* involved several constitutional issues,<sup>92</sup> I will focus on only one—the question of whether *Roe v. Wade* should be overturned. In *Roe*, the Supreme Court concluded that abortion regulations violated a woman's liberty or privacy interest in being able to choose to have an abortion in consultation with her physician.<sup>93</sup> In the first two trimesters of pregnancy, the Court concluded, a state could not regulate abortions to protect prenatal life.<sup>94</sup> The state's interest in protecting prenatal life became compelling only in the third trimester, after viability. Even at that point, the Court ruled, a state could not protect prenatal life if doing so harmed the pregnant woman's life or health.<sup>95</sup>

The Appellants in *Webster* argued that *Roe* should be overturned. As a matter of constitutional law, they needed to demonstrate that abortion regulations do not infringe a woman's liberty or privacy interest and that even if they do infringe that interest, the state has an overriding compelling interest in preserving prenatal life. The Appellees argued that *Roe* should be retained. They, therefore, needed to demonstrate that abortion regulations infringe women's liberty or privacy interests and that the state's interest in preserving prenatal life does not override those interests.

Those arguments could have been made in good faith. Under the test I have proposed, the Appellants could have argued that although abortion regulations restrict women's liberty interest, they are necessary because of the deep value we must give to protecting life. Similarly, the Appellees could have argued that despite the importance of valuing life, restricting abortions does not achieve that result. Let us examine the briefs<sup>96</sup> to see if the

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<sup>92</sup> See *supra* note 15.

<sup>93</sup> *Roe v. Wade*, 410 U.S. at 162 (“[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”).

<sup>94</sup> *Id.* at 163 (“This means, on the other hand, that, for the period of pregnancy prior to this ‘compelling’ point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”).

<sup>95</sup> *Id.* at 163–64 (“If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”).

<sup>96</sup> In this Article I will limit my discussion to the chief briefs on both sides, as well as those that represent both the typical “pro-life” and the typical “feminist” views. I will also discuss those briefs that, although not specifically tailored as “feminist,” did include a substantive discussion of women’s well-being.

arguments were made in good faith. In addition, let us consider whether the style of constitutional argumentation co-opted the substantive concerns of each side.

### *A. Appellants' Briefs*

#### 1. Protecting Women's Well-Being

To engage in a good faith argumentation, the Appellants needed to show that women's well-being would be protected if states were allowed to regulate abortion. Nevertheless, this issue was not discussed at all by the Appellants or the former Solicitor General.<sup>97</sup> Because the former Solicitor General and the Appellants did not even recognize the necessity of discussing women's well-being in the context of abortion restrictions, I conclude that the chief briefs for the Appellants did not reflect an attempt to engage in good faith argumentation.

In contrast, the brief filed by Feminists for Life of America<sup>98</sup> on behalf of the Appellants did consider women's well-being. Moreover, this brief was feminist in its structure in that it contained the personal stories of many individual women. To demonstrate the potential negative consequences of abortion, Feminists for Life provided extensive testimony from women who had abortions. For example, they illustrated that many black women die during legal abortions that are performed by white men, but that these deaths are not reported or are covered up.<sup>99</sup> They

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<sup>97</sup> Moreover, the former Solicitor General also failed to address the impact of abortion on women's lives. This is interesting given that the Government asked the Surgeon General to conduct an evaluation of the impact of abortions on women's health. The Surgeon General's study concluded that there was no evidence demonstrating that abortions have adverse health consequences on women. The Report stated: "Valid scientific studies have documented that, after abortion, physical health sequelae (including infertility, incompetent cervix, miscarriage, premature birth, and low birth weight) are no more frequent among women who experienced abortion than they are among the general population of women." Surgeon General's Report on Abortion, 135 CONG. REC. E33,908 (Daily ed. March 21, 1989). As to the effects of abortions on women's psychological health, the Report stated: "Although numerous case histories attest to immediate or delayed psychological problems following abortions, the actual numbers of women who have suffered in this way is unknown." *Id.* Rather than respond to this evidence responsibly, the Appellants and former Solicitor General ignored it entirely.

<sup>98</sup> Brief of Feminists for Life of America, *supra* note 83.

<sup>99</sup> *Id.* at 17-18.

further tried to portray abortion as detrimental to the well-being of black women by providing quotations that illustrated the racist motives of early advocates of contraception and abortion.<sup>100</sup>

Feminists For Life agreed that it is important to protect women's well-being in relation to reproductive activity. However, they disagreed with pro-choice feminists as to what form that protection should take. They seemed to believe that women naturally want to protect fetal life and not have abortions and that it is only through the coercive and racist forces of our society that abortion becomes necessary. They favored regulations of abortion that would provide women with more accurate knowledge of the consequences of having an abortion and the possible results of bearing an unwanted child. Because *Roe v. Wade* arguably does not permit such regulations, especially when they would occur during the first trimester, these feminists therefore felt compelled to argue that *Roe* should be overturned to permit increased regulation of abortion. They seemed confident that the problem of abortion will largely disappear if women are more fully informed about reproductive matters.

From a feminist perspective this argument is problematic because it represents gross stereotypes about women and is disrespectful to a woman's ability to assess her personal situation. The brief seems to assume that all women would choose to bring their pregnancies to term if their consciousnesses were raised. However, one integral aspect of consciousness-raising is the recognition that not all women need to respond to a life situation in the same way.<sup>101</sup> Consciousness-raising tries to move women away from a monolithic, programmed patriarchal response to one that better reflects consideration of their own well-being. In fact, consciousness-raising that results in women having a uniform view of society has been criticized.<sup>102</sup> Some women who have

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<sup>100</sup> *Id.* at 18–19 n.35.

<sup>101</sup> See, e.g., *Introduction*, in *WOMEN'S CONSCIOUSNESS, WOMEN'S CONSCIENCE: A READER IN FEMINIST ETHICS* xv (Barbara H. Andolsen, Christine E. Gudorf & Mary D. Pellauer eds. 1985) ("However, listening to one another's stories, we also confront our differences sharply and often uncomfortably . . . . One of the more serious challenges facing feminist ethics is to maintain genuinely open and fair dialogue about women's experiences.").

<sup>102</sup> See Anne Bottomley, Susie Gibson & Belinda Meteyard, *Dworkin; Which Dworkin? Taking Feminism Seriously*, 14 J.L. & Soc'y 47, 56 (1987) (criticizing some uses of consciousness-raising).

had abortions may regret, in hindsight, that social circumstances forced them to make that decision. However, it is hardly feminist to let those individual stories speak for all women. Thus, although Feminists for Life did attempt to consider the impact of abortion regulations on women's well-being, on close examination their consideration of women's well-being seems inconsistent with some major tenets of feminist theory.

## 2. Preserving Prenatal Life

The second task for the Appellants' briefs was to show that the courts have compelling reasons to provide legislatures with more room to protect prenatal life by regulating abortion. Surprisingly, the briefs contained virtually no argument for why we should value prenatal life more than we do.

The brief by the former Solicitor General does not explain why protecting prenatal life should be considered an important or compelling state interest.<sup>103</sup> The former Solicitor General argued that the state's asserted interest in protecting prenatal life is not necessarily qualitatively different at different periods of pregnancy.<sup>104</sup> Even if it is, he asserted, the interest may still be sufficiently strong at all stages of pregnancy to constitute a compelling state interest. Interestingly, he argued in the negative; he did not offer any affirmative reasons to regard the interest as compelling. He said:

But even if there is a core of common sense in the notion that a State's legitimate interest in prenatal life 'grows in substantiality' along with the development of the fetus, it does not follow that this interest should not be regarded as *compelling* throughout pregnancy. An interest may be sufficiently weighty to be compelling in the constitutional sense even if subsequently it takes on even greater urgency.<sup>105</sup>

The Solicitor General merely offered historical evidence to justify why states have a compelling interest in protecting prenatal life.

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<sup>103</sup> Brief for the United States, *supra* note 29.

<sup>104</sup> *Id.* at 15.

<sup>105</sup> *Id.*

He noted that state anti-abortion laws in the mid-nineteenth century were directed at "what was widely viewed as a moral evil comprehending the destruction of actual or nascent human life."<sup>106</sup> This historical argument, however, does not support the compelling interest argument. In *City of Richmond v. J.A. Croson*, the former Solicitor General himself asserted that the compelling interest test must focus on *contemporary* circumstances rather than historical circumstances.<sup>107</sup> It was inconsistent for the Solicitor General to argue for a different test based on historical circumstances in *Webster*.<sup>108</sup> Moreover, the argument fails to explain *why* the states have valued prenatal life.

Similarly, the brief on behalf of Feminists for Life of America failed to explain why we should value prenatal life. It simply argued that because some women will come to value prenatal life more after an abortion, we should let the states decide how to protect women's emotional health by regulating abortion.

Finally, the brief on behalf of the National Right to Life Committee was also silent about why we should value prenatal life.<sup>109</sup> The Committee simply relied on an unelaborated, historical state interest argument similar to that employed by the former Solicitor General to support overturning *Roe*.<sup>110</sup> It did not try to justify protecting prenatal life as a compelling state interest. Instead, after arguing that a rational basis test should be used to assess abortion restrictions, it summarily concluded that the statute should be affirmed because "[g]iven the states' historic interest in preserving life from the time of conception (an interest firmly rooted in the history and conscience of our nation), there is

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<sup>106</sup> *Id.* at 16.

<sup>107</sup> In *Croson*, the Supreme Court insisted that the City of Richmond produce contemporary evidence of discrimination against blacks in the construction industry to justify the city's minority set-aside program. It was *not* willing to rely upon a "generalized assertion" to meet the compelling interest test. *Id.* at 723. It is inconsistent for the Solicitor General to argue generally in *Webster* that a state needs to restrict women's liberty interests through abortion regulations to protect prenatal life but then reject such generalized assertions about blacks' experience in the construction industry in *Croson*.

<sup>108</sup> See The Brief of Seventy-Seven Organizations Committed to Women's Equality as *Amici Curiae* in Support of Appellees at 20, *William L. Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989) (No. 88-605) for an excellent comparison of the United States' position on what is a compelling interest in *Croson* and in *Webster*.

<sup>109</sup> See Brief Amicus Curiae of the National Right to Life Committee, Inc. in Support of Appellants, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605).

<sup>110</sup> *Id.* at 20.

clearly a rational basis to uphold the Missouri statutes at issue herein."<sup>111</sup> This final sentence of the brief is its only reference to the importance of valuing life.

This discussion of the Appellants' briefs suggests that their legal posturing distorted their substantive arguments. They seemed to lose sight of why they wanted to regulate abortion and seemed largely unable to respond to arguments about how abortion regulations affect women's well-being. The only exception to this pattern is the discussion of women's well-being in the brief filed by Feminists for Life. At least a portion of that brief suggests that there are people who are trying to justify state regulation of abortion in feminist language. Feminists who oppose abortion regulations might learn from the communitarian manner in which this group tries to frame its argument. Its conclusion may be wrong, but the structure of its argument may be correct.

### *B. Appellees' Briefs*

#### 1. Protecting Women's Well-Being

To engage in good faith argumentation the Appellees needed to demonstrate that women's well-being would be harmed if states were allowed to regulate abortion. However, many of the briefs submitted in support of the Appellees did not sufficiently describe how women's well-being would be affected by abortion restrictions.

The brief filed by the National Organization for Women (NOW) relied almost entirely on a privacy argument in urging the court not to overturn *Roe*.<sup>112</sup> In so doing, NOW failed to make the best available feminist arguments concerning women's well-being. Instead of relying on an atomistic privacy argument, NOW could have made a more group-based, equality argument under the fourteenth amendment's Equal Protection clause. Such an argu-

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<sup>111</sup> *Id.* at 26.

<sup>112</sup> Brief for the National Organization for Women as Amicus Curiae Supporting Appellees, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief for NOW].

ment would permit us to discuss how abortion regulations are disrespectful of the well-being of women as a class.<sup>113</sup>

The NOW brief did seem to recognize the need to make an argument based upon a consideration of women's well-being. While the brief discussed the effects of both unwanted pregnancy<sup>114</sup> and abortion regulations<sup>115</sup> on women's lives, it failed to translate that discussion into effective legal argument. Rather than use the fourteenth amendment for this purpose, the brief relied on the thirteenth amendment. It stated, "Requiring women to surrender control of their bodies to the state during pregnancy is in a very real sense a form of involuntary servitude and thus is inconsistent with the letter and spirit of the thirteenth amendment."<sup>116</sup> This argument was brief and unconvincing. It is difficult to establish the applicability of the thirteenth amendment in the context of abortion because the state is not necessarily trying to enslave a woman during her pregnancy when it restricts abortion; it is trying to punish her for choosing an abortion after the pregnancy has occurred. Such punishment places an inequitable burden upon women in our society since we take no steps to encourage men to avoid unwanted pregnancies, and could therefore better be described as a fourteenth amendment violation. Moreover, by putting the argument in thirteenth amendment terms, NOW added the confusing issue of the meaning of enslavement and risked being disrespectful to the Black experience of slavery. In sum, by failing to make an equal protection argument, the NOW brief did not accurately discuss the implications of abortion regulations on women's well-being.

In contrast, groups representing women of color, juvenile women, and international women's health organizations filed briefs in *Webster* that discussed women's well-being more directly.<sup>117</sup> Unlike the briefs discussed above, these briefs starkly

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<sup>113</sup> Elsewhere, I have discussed this approach as an "equality as compassion" or "equality as respect" approach. See Colker, *Feminism, Theology, and Abortion*, *supra* note 18.

<sup>114</sup> Brief for NOW, *supra* note 112, at 10.

<sup>115</sup> *Id.* at 15.

<sup>116</sup> *Id.* at 13.

<sup>117</sup> See Brief *Amici Curiae* of the National Council of Negro Women, Inc.; National Urban League, Inc.; The American Indian Health Care Association; The Asian American Legal Defense Fund; Committee for Hispanic Children and Families; The Mexican American Legal Defense and Education Fund; The National Black Women's Health Project; National Institute for Women of Color; National Women's Health Network; Organizacion

portrayed the impact that *Roe*'s reversal would have on poor women and juveniles. They did not discuss the abortion issue entirely as a privacy issue; they discussed it as an issue jeopardizing the well-being, and very lives, of women.

The brief filed by the National Council of Negro Women and other organizations representing women of color argued that when abortion was illegal, women of color were disproportionately represented among those who died or were left sterile by abortion. For example, in New York in 1965 before abortion became legal, there were four abortion deaths for every 100,000 live births for white women, fifty-six abortion deaths for every 100,000 live births for non-white women, and sixty-one abortion deaths for every 100,000 live births for Puerto Rican women.<sup>118</sup> The legalization of abortion, on the other hand, has helped save the lives of women of color, they argued. After New York legalized abortion, the annual rate of abortion-related deaths fell by fifty-one percent.<sup>119</sup> Additionally, the brief made clear that it is not enough to make abortion legal if we want to protect the well-being of poor women of color. Even with legalized abortion, women of color continue to seek illegal abortions because they cannot afford legal abortions.<sup>120</sup> Any increase in the cost of abortion, they argued, forces some poor women to choose illegal abortions which are not performed by licensed health care practitioners. From these facts, they concluded:

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Nacional de la Salud de la Mujer Latina; Organization of Asian Women; Puerto Rican Legal Defense and Education Fund; Women of Color Partnership Program of the Religious Coalition for Abortion Rights; Women of All Red Nations, North Dakota; YWCA of the U.S.A., and Other Organizations in Support of Appellees, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief of the National Council of Negro Women]; Brief *Amici Curiae* in Support of Appellees by Center for Population Options, The Society for Adolescent Medicine, The Juvenile Law Center, and the Judicial Consent for Minors Referral Panel, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief of the Center for Population Options]; Brief of *Amici Curiae* International Women's Health Organizations in Support of Appellees, *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief for International Women's Health Organizations]; Brief of *Amici Curiae* American Public Health Association, et al. in Support of Appellees *William L. Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605) [hereinafter Brief of American Public Health Association]. See also Brief of Canadian Women's Organizations, *supra* note 5 (discussing abortion issue in terms of the right of a woman to control her reproductive capacity to live as full and equal participant in society).

<sup>118</sup> Brief of National Council of Negro Women, *supra* note 117, at 17-18.

<sup>119</sup> *Id.* at 20-21.

<sup>120</sup> Between 1975 and 1979, for example, 82% of the women who died after illegal abortions were black and Latina. *Id.* at 21.



This [sic] data, and data on health complications from illegal abortions among the poor, even after legalization, suggest that access to abortion must be very broad to ensure against unconscionable discrimination. Any dilution of *Roe v. Wade* spells a return to an era when women seeking abortions had to risk their lives in order to obtain one.<sup>121</sup>

One important theme in the brief by women of color is that the well-being of women depends on the cost of abortion, not simply the legality of abortion. They argued that abortion is already too expensive for poor women to be able to protect the health of themselves and their children. Even without the reversal of *Roe*, poor women's lives are already endangered when they need an abortion. Every incremental increase in the cost of abortion, such as that caused by the imposition of hospitalization requirements, means fewer abortions for poor women or delayed abortions at significant health risk to poor women. The brief stated that Medicaid-eligible women had abortions two to three weeks later than other women; nearly half of them reported that financial reasons caused their delay. This delay caused twenty-two percent of Medicaid-eligible women in 1982 to have second-trimester rather than first-trimester abortions, increasing substantially the health care risks and costs of having an abortion.<sup>122</sup>

The argument made by women of color was deeply feminist because it asked the court to protect *all* women, not just middle-class, adult, white women. The *Roe* privacy argument easily allowed the result in *Harris v. McRae* to occur because it was embedded in an individualistic rather than a communitarian framework. The brief filed by the National Council of Negro Women showed that we need to make abortion arguments in equality terms, both in order to retain *Roe* and to overturn *Harris*.

Nevertheless, although the authors incorporated good faith elements in their brief, they devoted little space to translating into legal argument their observations about the impact of reversing *Roe* on the well-being of women of color. They never directly told the Court that it would need not only to uphold *Roe* but to reverse *Harris v. McRae* to accept the full implications of their argument. Perhaps they were reluctant to make such an argument

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<sup>121</sup> *Id.* at 22.

<sup>122</sup> *Id.* at 50-51.

to a Court which seems to be hostile to radical, class, or race-based arguments. However, they might have written a more effective brief had they translated their argument more directly into equal protection terms. The briefs of the Appellants attacked the privacy justification for *Roe* as unprincipled. By offering a cogent equal protection perspective, the women of color could have provided the Court's progressive members with an opportunity to begin to reweave our abortion legal argumentation using more radical and communitarian language, even if the first step had to occur in a dissenting opinion. As the dissent in *Homer Plessy v. John Ferguson*<sup>123</sup> served as the foundation for *Oliver Brown v. Board of Education*,<sup>124</sup> the dissent in *Webster* could have served as the foundation for the overturning of *Harris v. McRae* at a future time.

The brief representing juvenile women likewise made powerful arguments about the implications of reversing *Roe* for the well-being of juvenile women. The brief observed that before abortions were legal and relatively accessible to juveniles, a large proportion of teenage girls who committed or attempted to commit suicide thought they were, or actually were, pregnant.<sup>125</sup> For teenagers who do carry a fetus to term, the mortality rates from continued pregnancy and childbearing are much higher than for women aged twenty to twenty-four.<sup>126</sup>

However, the brief on behalf of juveniles also failed to translate its substantive observations into an equal protection framework; instead, the brief relied entirely on the right to choose as a liberty interest.<sup>127</sup> As I have argued above, when we use individualistic liberty arguments, we do not fully protect the interests of poor women and women of color. To borrow a term from Mari Matsuda, we can learn a lot about good constitutional argumentation by "looking to the bottom."<sup>128</sup> The evidence from "the bottom"—women of color, poor women, and teenagers—is that abortion regulations harm the well-being of both women and their children; our legal arguments need to reflect that fact.

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<sup>123</sup> 163 U.S. 537 (1896).

<sup>124</sup> 349 U.S. 294 (1955).

<sup>125</sup> Brief by Center for Population Options, *supra* note 117, at 9.

<sup>126</sup> *Id.* at 7.

<sup>127</sup> *Id.* at 13–23.

<sup>128</sup> Matsuda, *supra* note 47.

## 2. Preserving Prenatal Life

The second task for the Appellees in making a good faith argument would be to demonstrate that allowing state legislatures to regulate abortion would not serve a state interest in preserving prenatal life. However, in making this argument, none of the briefs submitted in support of Appellees acknowledged that it is important to value prenatal life.

The NOW privacy perspective failed to recognize women's responsibilities to others and the possibility of valuing prenatal life. It rejected arguments about women's responsibilities to society, stating:

There is no authority for the proposition that the state can compel an individual to give up the right to control his or her body to benefit another. The idea, for example, that the state could determine that a supposedly less worthy member of society must donate an organ to save the life of a pillar of the community is unthinkable. So too, is it far beyond the pale to suggest that a parent be ordered to undergo surgery and months of life-threatening activity in order to benefit a child.<sup>129</sup>

This argument begs the question of why it is unthinkable for the state to compel a person to donate an organ in order to save the life of another, especially when that person is a relative. Patricia Beattie Jung, a religious feminist, agrees that the state should not compel organ donation, yet offers a more communitarian perspective on that issue than does the NOW brief. Jung suggests that we should live in a society in which people are socialized to want to donate organs to sustain the life of another person. However, she rejects the idea that such values should be compelled.<sup>130</sup> Thus, one can reject the coercive features of abortion restrictions without also denying the importance of the values of donation.

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<sup>129</sup> Brief for NOW, *supra* note 112, at 10–12.

<sup>130</sup> Patricia Beattie Jung, *Abortion and Organ Donation: Christian Reflections on Bodily Life Support*, in *ABORTION & CATHOLICISM* 141. See also Colker, *Abortion and Dialogue*, *supra* note 26, at 1397 n.74.

The Brief by Catholics for a Free Choice also fails the good faith disagreement test by failing to address the issue of the value of prenatal life. It refuses to acknowledge that we may want to live in a world in which we have interconnected responsibilities to each other. It deals with the responsibility issue briefly in a footnote:

Constitutional concerns of privacy protect bodily integrity of persons and do not require exceptional samaritanism. A parent cannot be compelled to save the life of a born child by organ donation, transfusion or other invasive practice; nor could a fetus compel anyone (including the biological "father" of the fetus) to provide a blood transfusion in *utero* or after birth. There is no question that the individual's rights of privacy and physical integrity would prevail over the child's or the fetus' claim for assistance.<sup>131</sup>

The brief fails adequately to address the possibility that a woman might have a responsibility to her fetus. Instead, it summarily concludes that nearly all women do consider interests of other persons in making an abortion decision: "A pregnant woman in the exercise of her conscience takes into account the many factors relevant to the decision, which may include the consideration of the needs and relations of persons (including the pregnant woman herself and her already born children)."<sup>132</sup>

The Brief for the Appellees also relied entirely on a privacy argument. However, as an improvement over the two briefs discussed above, it did try to define the privacy right in a nonatomistic way. The Appellees said:

The Solicitor General's most serious error is his argument that a fundamental right to abortion does not flow logically out of the general right to privacy or personal autonomy which protects matters of procreation and family life, including contraception, because the woman is not "isolated in her privacy" in making the abortion decision . . . .

This line of argument misconceives the nature of the "privacy" right . . . . That right is in no way dependent on

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<sup>131</sup> Brief for Catholics for a Free Choice, *supra* note 42, at 31 n.6.

<sup>132</sup> *Id.* at 32.

whether an individual is "isolated" in his or her privacy . . . . Such decisions are best left to the individual rather than the state, not because of some abstract value in solitary decisionmaking, but because of the profound effect such decisions have on an individual's destiny . . . .

Indeed, if this Court adopts the Solicitor General's proposed analysis of fundamental rights, according to which the countervailing state interests undercut the nature of the right itself rather than guiding the extent to which it can be abridged, it will have set itself on a course which reaches far beyond the narrow issue of proscription of abortion.<sup>133</sup>

Thus, this brief tried to salvage privacy theory by making it appear less atomistic. However, this argument fails to address how the abortion decision may have a profound effect on others. The Appellees did not allow for the possibility that a pregnant woman may have obligations to others, including the fetus. Their brief cited with approval cases in which pregnant women were found not liable for tortious prenatal injuries<sup>134</sup> and criticized cases in which courts tried to compel women to modify their behavior to protect fetal well-being.<sup>135</sup> Substantively, the Appellees may be correct that states act unconstitutionally when they attempt to control women's behavior during pregnancy. However, I do not see how we can be convinced of that fact, as feminists, without being offered a communitarian, woman-centered perspective that considers a woman's responsibility to her fetus in a nonatomistic way. We would need to "let in" the fetus to achieve that argument. Thus, I do not find this attempt to salvage privacy theory effective.<sup>136</sup>

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<sup>133</sup> Brief for Appellees, *supra* note 25, at 9-10.

<sup>134</sup> *Id.* at 12.

<sup>135</sup> *Id.* at 12 n.22.

<sup>136</sup> The failure of the Appellees to create a convincingly feminist (i.e., group-based and communitarian) privacy theory raises the question of whether liberal constitutional arguments can ever be feminist. Carl Wellman suggests that the language of rights can be communitarian. He says:

The language of rights does presuppose some sort of individualism, for every right is possessed by some individual right-holder. But these individuals need not be social atoms—self-contained, independent and isolated persons. Indeed, for reasons we have already explained, any individual capable of possessing moral rights *cannot* be a social atom. This is because there are three roles implicit in the very concept of a right—that of the first party who holds the right, the second

In contrast to the briefs discussed above, the brief filed on behalf of women of color "let in" the fetus by not portraying the abortion issue as a contest between women and prenatal life. It noted that illegal abortions cause women of color to become sterilized in disproportionate numbers.<sup>137</sup> The brief on behalf of juvenile women focused on protecting prenatal life more directly. It observed that teenage girls are approximately half as likely to receive prenatal care as other pregnant women and that children of teenage mothers are twice as likely to die in infancy than those born to women in their twenties.<sup>138</sup>

The Brief by International Women's Health Organizations<sup>139</sup> related the issue of maternal health to fetal well-being even more directly. The authors noted that the United States ranks nineteenth worldwide in infant mortality, a statistic that is largely attributable to high infant mortality rates among poor women. They stated, "It has been established that the increase in the legal abortion rate is the single most important factor in reductions in both white and nonwhite neonatal mortality rates."<sup>140</sup> In addition, they noted that other countries take a more communitarian approach to the abortion issue by recognizing how a woman's pregnancy can affect the well-being of other family members. Many western countries, such as Britain, permit lawful abortion when continuation of a woman's pregnancy involves risk of injury to the physical or mental health of any existing children in her

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party against whom the right holds, and the third party who might intervene in any confrontation between the right-holder and the second party. Far from assuming the existence of atomic individuals, the assertion of any right presupposes a social nexus in which individuals interact and stand in essentially social relations.

Carl Wellman, *Doing Justice to Rights*, 3 HYPATIA 153, 154-55 (1989).

Although Wellman is wrong to assume that there is necessarily a third party in rights disputes, it is helpful to realize that rights claims are always made oppositionally to another, necessarily raising the question of individuals' relations to each other. A *failure* to make a rights claim may leave an individual isolated and unprotected; making a rights claim, however, can produce a relationship of responsibility between individuals. This leaves open the possibility that a nonatomistic privacy argument exists; however, a truly convincing one has not yet been made. In a previous work, I have tried to articulate a group-based privacy theory. See Ruth Colker, *Pornography and Privacy: Towards the Development of a Group-Based Theory for Sex-Based Intrusions of Privacy*, 1 LAW & INEQUALITY: A JOURNAL OF THEORY & PRACTICE 191 (1983).

<sup>137</sup> Brief of the National Council of Negro Women, *supra* note 117, at 15-16.

<sup>138</sup> Brief of the Center for Population Options, *supra* note 117, at 8.

<sup>139</sup> Brief of International Women's Health Organizations, *supra* note 30.

<sup>140</sup> *Id.* at 16.

family.<sup>141</sup> This approach protects a woman's right to have an abortion without pretending that the woman is isolated in her pregnancy.

Nevertheless, not one of these briefs sufficiently discussed the state's interest in valuing life. No brief supporting the Appellees had an entire section which acknowledged the importance of valuing life but then showed how regulating abortion does not achieve that value. We can make a much more powerful feminist argument that is also more open to the state's interest in protecting prenatal life within existing constitutional discourse.

## V. THE *WEBSTER* DECISION

The preceding discussion has demonstrated that neither the Appellants nor the Appellees sufficiently demonstrated to the Court how abortion regulations affect women's well-being. Nor did either party sufficiently address the value of prenatal life. Nevertheless, amicus briefs on behalf of the Appellees provided the Court with evidence about the impact of abortion regulations on the lives of women of color, poor women, and teenage girls both in the United States and abroad. Although those briefs could have done a better job of translating their concerns into constitutional language, the documentary evidence was available, had the Court been committed to protecting women's well-being.

An examination of the text of the *Webster* decision, however, reveals virtually no understanding by the Court of the impact of abortion regulations on women's lives. No member of the Supreme Court in *Webster*, including any of the dissenters, demonstrated a real grasp of the probable impact of the Missouri legislation on women's well-being. Nor did any Justice discuss the fetal life issue adequately. Although the primary purpose of this Article is to illustrate how lawyers could make good faith arguments concerning abortion to the Court, I think it is useful to look at the Court's response when some of those arguments are raised, even if by amici.

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<sup>141</sup> *Id.* at 15 n.54.

The question of whether to overrule *Roe v. Wade* was presented in the context of determining the constitutionality of a requirement that a physician ascertain whether a fetus is viable prior to performing an abortion on any woman who he or she has reason to believe is twenty or more weeks pregnant. Under the *Roe* framework, such restrictions were not permissible before the third trimester. This provision contained technical and substantive difficulties. Technically, the provision appeared to require physicians to perform viability tests that were contrary to accepted medical practice, including, for example, performing amniocentesis on a fetus that was under twenty-eight weeks old. If that had been the actual meaning of the statute, most of the Justices would have been compelled to find it unconstitutional even under the lenient rational basis standard of review because the statute would have served no rational public purpose. To avoid that conclusion, Chief Justice Rehnquist, speaking for a plurality of the Court, offered a somewhat strained interpretation of the statute so that a physician would have the discretion to perform only tests that were medically appropriate.<sup>142</sup>

Having overcome that technical hurdle, Rehnquist then turned to the substantive question of whether a pre-third trimester restriction to protect potential life should be permitted although such restrictions were not permitted under *Roe*. Rehnquist concluded that the *Roe* trimester framework was too rigid; that if the state has an interest in preserving potential human life after viability, it also has an interest in preserving that potential life before viability.<sup>143</sup> Rehnquist did not consider the impact that such regulations would have on women's well-being.

Justice Scalia, unlike Rehnquist, concluded that *Roe* should be overturned and that states should be free to regulate or criminalize abortion at any stage of pregnancy.<sup>144</sup> Clearly, as discussed above, his view failed to consider the impact on women's well-being of abortion regulations, including criminal regulations.

Finally, Justice O'Connor, although providing the fifth vote to uphold the Missouri statute, did not argue that *Roe* needed to be overturned or even modified to reach the conclusion that the

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<sup>142</sup> 109 S. Ct. at 3055.

<sup>143</sup> *Id.* at 3057.

<sup>144</sup> *Id.* at 3064.



viability provision was constitutional. O'Connor reinterpreted the Court's prior decisions to require that states "not impose an undue burden on a woman's abortion decision."<sup>145</sup> Because she concluded that the viability tests could be performed without markedly increasing the cost of abortion, O'Connor argued that the undue burden test had been satisfied.

The discussion of women's well-being by the dissenters, although an improvement over the plurality's discussion, was also inadequate. Justice Blackmun said that he feared "for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided" and "for the integrity of, and public esteem for, this Court."<sup>146</sup> Despite the ammunition available from the briefs filed by women of color and juvenile girls, Blackmun did not elaborate on those statements. Rather, he spent most of his opinion explaining why there was no good reason to change the course of the privacy doctrine initially formulated in his opinion in *Roe*.

One of the most disappointing parts of Blackmun's opinion is his conclusion that, if the majority's technical interpretation of the second provision were correct, he "would see little or no conflict with *Roe*."<sup>147</sup> In other words, he appeared to agree with Justice O'Connor that such a provision would not constitute an "undue burden" on a woman's abortion decision. Blackmun dissented from the majority because he took issue with the technical interpretation of the viability testing provision, not because he fundamentally disagreed about the impact that the requirement would have on women's lives and well-being.

If Justice Blackmun had truly considered the "liberty and equality" interests of sixteen million women, he would not have been so easily satisfied. As the briefs that were presented to the court by women of color and teenage women dramatically illustrated, raising the cost of abortion, even marginally, has a marked impact on the ability of poor women to obtain abortions. Furthermore, because women of color and teenage women are more likely to delay abortion decisions, they will be hit harder by the viability testing requirement than other women. For poor women,

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<sup>145</sup> *Id.* at 3063-64.

<sup>146</sup> *Id.* at 3067.

<sup>147</sup> *Id.* at 3070.

even the requirement that they pay for their own abortions is an undue burden on their reproductive decision making. Raising the cost of abortion presents an even greater burden. Thus, Justice Blackmun did not fully consider the statute's implications on women's well-being under his privacy framework.

The *Webster* decision is equally disappointing in its treatment of the interest in protecting prenatal life. Justice Rehnquist's plurality opinion failed to articulate why a state has a compelling, or even a legitimate, interest in protecting prenatal life before viability. Rejecting the viability standard, he said: "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should be a rigid line allowing state regulation after viability but prohibiting it before viability."<sup>148</sup> This statement is phrased in the negative and hardly counts as a justification under the compelling interest standard. He also stated, "The Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality."<sup>149</sup> However, his statement does not explain why the state should be allowed to regulate abortion before viability or why regulation of abortion meets the compelling interest standard.

Although Justice Blackmun's dissent did not "let in" the fetus, he did recognize the weakness in the plurality's discussion of the importance of protecting prenatal life. Blackmun stated: "The opinion contains not one word of rationale for its view of the State's interest. This 'it-is-so-because-we-say-so' jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place."<sup>150</sup> Similarly, he criticized the test purportedly used by the majority—whether the regulation "permissibly furthers the State's interest in protecting potential human life"—as circular and totally meaningless because the standard of whether a regulation "permissibly furthers" the State's interest is itself the question before the Court.

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<sup>148</sup> *Id.* at 3057.

<sup>149</sup> *Id.* at 3058.

<sup>150</sup> *Id.* at 3075.

It therefore could not be the standard that the Court applied in resolving the question.<sup>151</sup>

Thus, the *Webster* decision is disappointing in its discussion of both key issues—protecting women's well-being and valuing prenatal life. Not only did the majority seem not to understand the meaning of abortion regulations to women's lives, but even the dissenters failed to display much understanding or sensitivity. They seemed more determined to protect the integrity of their prior decisions than to consider the reality of new abortion restrictions on women's lives. In addition, the opinion leaves us with no lasting understanding of why protecting the value of prenatal life is more important than protecting the reproductive well-being of women. It does not reflect real dialogue within the Court, nor does it provide a basis for real dialogue in society at large.

## VI. CONCLUSION

Both the briefs filed in *Webster* and the Court's opinions were a major disappointment from a feminist perspective because they did not reflect real dialogue or good faith argumentation on the abortion issue. Although many feminist briefs were filed in *Webster*, few of them gave the Court a good grounding in how abortion regulations dramatically affect the well-being of women. When those arguments were made, they were often hidden behind a privacy framework, a framework that is ill-equipped to focus on women's well-being, instead of forcefully argued as part of an equal protection framework. Nor did any of the feminist briefs demonstrate a deep commitment to protecting the value of prenatal life in society; none of them recognized that the destruction of prenatal life to protect women's well-being is an unfortunate rather than a welcome outcome.

The Supreme Court's decision in *Webster* was also a disappointment. Not once did the plurality's opinions consider the impact of their decisions on the lives and health of women. Not

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<sup>151</sup> *Id.* at 3076.

once did the plurality opinions acknowledge the powerful arguments made by women of color about the effects of abortion regulations on their lives and health. The only "interest" the plurality opinions purported to protect was the states' unjustified interest in protecting prenatal life. The plurality's opinions were so disconnected from considerations of women's well-being that the reader could easily forget that fetuses are found in women, not in an independent state. And, disappointingly, even the dissenters failed to discuss the issue fully from the perspective of women's well-being.

The briefs by the various feminist organizations are not to blame for the disrespectful picture of women's role in reproduction which characterizes the plurality's opinions in *Webster*. The blame goes more directly to President Reagan who picked many of the Justices precisely because they think of reproductive decisions in a way that is disrespectful of women's well-being. The fact that Reagan-conservatives do not understand that reproduction issues are profoundly women's issues, however, should not lead us, as feminists, to forget how to talk about reproduction in women-centered language.

By re-examining our pro-choice perspective, I believe we can do better. We can find ways to argue against state regulation of abortion from a communitarian, pro-woman perspective that has not been corrupted by liberal individualism. State regulation of abortion kills women and endangers women's health. A state has no right to impose such a death sentence on women who face unwanted and usually unintended pregnancies. We need to start using constitutional discourse to make this point, to be a part of the process of transforming our Constitution into a more radical document.